IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 29.3.2007

Coram:

The Honourable Mr.Justice J.A.K.SAMPATH KUMAR

A.S.No.850 of 1992

1.Rengaswami(deceased)
2.Pappammal
3.R.Murugasamy ..Appellants/Plaintiffs
Appellants 2 and 3 brought on record
as Lrs of the deceased sole appellant
as per order of court dated 28.11.2006
made in C.M.P.No.10137 of 2006.

-vs-

1.Ramaswami (Died)
2.Pappayyammal
3.R.Nallasivam
The death of R1 recorded vide
order of Court dated 18.7.2006
made in A.S.No.850 of 1992.
R2 and R3 are Lrs of the
deceased first respondent vide
order of court dated 18.7.2000.

4.The Assistant Director of
Survey and Land Records,
Erode, Periyar District. ..Respondents (Respondents)

First Appeal filed Under Section 96 of the Civil Procedure Code against the Judgment and decree dated 14.8.1992 in O.S.No.382 of 1987 on the file of Subordinate Court, Erode, Periyar District.

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For Appellants:- Mr.K.Doraisamy, Senior Advocate
for M/s.S.T.S.Murthi and R.Santhanam

For Respondents:-
for R1 :-died
for R2 and R3:-Mr.S.Sethuratnam, Senior Advocate
for Mr.M.Duraisamy
for R4:- No appearance

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JUDGMENT

This appeal is filed against the Judgment and decree dated 14.8.1992 in O.S.No.382 of 1987 on the file of the First Additional Sub Court, Erode in and by which, the learned Sub Judge after analysing the evidence in depth found that the plaintiff is not entitled to suit claim and accordingly dismissed the suit.

2. For convenience, the parties are referred as arrayed in the Original Suit. The brief facts of the case are as follows:-

3. Plaintiff states as follows:-

3.1. The plaintiff is the elder brother of the 1st defendant. Their father is one Muthusami gounder. There was a registered partition between the above said Muthusami gounder and his brothers on 30.10.1956. In pursuance of the said partition deed, the plaintiff and first defendant became entitled to specific portions after the death of Muthusami gounder. The plaitniff and the first defendant had effected a oral partition in or about the year 1970 and that they are in possession and enjoyment of their respective portions.

3.2. There arose misunderstandings between the plaintiff and the family of the first defendant recently. The second defendant who is the wife and the 3rd defendant who is the only son of the 1st defendant are instigating the 1st defendant to cause obstructions to the plaintiffs peaceful possession and enjoyment of the suit 'A' Schedule properties. On 15.9.1987, the defendants 1 to 3 armed with deadly weapons and hirelings made attempts to disturb the peaceful possession and enjoyment of the plaintiff in the 'A' Schedule properties. But by the timely intervention of the neighbours, the plaintiff was able to drive them away. The defendants 1 to 3 went away challenging that they would gather more men and material and would cause obstructions by unlawfully, trespassing into the suit 'A' schedule properties. If they carry out their threat into action, then the plaintiff would be put to much loss and hardship in his peaceful possession and enjoyment of the plaint 'A' schedule properties.

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3.3. In case, if this court comes to the conclusion that the oral partition set up by the plaintiff as above is not acceptable, the plaintiff prays that a decree for partition of the plaint 'B' Schedule properties may be granted in the alternative with a view to avoid further litigation. Hence the suit.

4.Written statement of 3rd defendant adopted by D1 and D2 reads as follows:-

4.1. It is admitted that there was an oral partition by metes

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and bounds, not in 1970, but long before that. After the partition, the plaintiff and the first defendant took possession of the respective plots that fell to their share, and have been in possession and enjoyment of the same as the exclusive owners thereof. So much so, in the last resurvey, which was based on actual possession, the plots in the possession and enjoyment of the parties have been separately demarketed, designated with new survey numbers and pattas issued to the respective parties in possession.

4.2. The plaint 'A' Schedule and plans which purport to show the plots in the possession and enjoyment of the plaintiff are wrong and misleading in every respect.

4.3. By giving such false particulars, the plaintiff is scheming to grab all the best possible plots and leave the next best to the defendants 1 to 3.

4.4. And in as much as there has already been a partition between the plaintiff and the first defendant, the alternative relief of partition also is not available to the plaintiff. Hence, the suit is liable to be dismissed.

5. Plaintiff examined as P.W.1. One Thiru.Nallasamy examined as P.W.2. Ex.A.1 to A.13 were marked on the side of the plaintiff. 3rd defendant examined as D.W.1. Exhibits B1 to B11 were marked on the side of the defendants to confront the claim of the defendant.

6. The lower court after analysing the evidence in depth found that the plaintiff is not entitled to suit claim and accordingly dismissed the suit.

7. The present appeal is filed against such finding.

8. Heard Mr.K.Doraisamy, learned Senior Advocate for the appellants and Mr.Sethuratnam, learned Senior Advocate for the respondents.

9. Upon hearing the rival claims the points for consideration are:-

1)Whether the plaintiff is in possession of the suit property viz., 'A' Schedule property as on date in pursuance of the oral partition alleged by him?

2)Whether the defendants are in enjoyment of the properties as stated in the written statement, in pursuance of the oral partition between the parties to the suit.

3)Whether the plaintiff is entitled for injunction in respect of the suit property viz., A Schedule Property?

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4)Whether the plaintiff is entitled for partition of the properties of one Muthusamy Gounder, who is the father of the plaintiff and first defendant, as the properties of Muthusamy Gounder were already orally partitioned and enjoyed by the plaintiff and the first defendant independent in their own right?

5)Whether the finding of the lower court in dismissing the suit is in order?

10.Point No.1:-

10.1.Admittedly, the suit property belongs to one Muthusamy Gounder. Plaintiff and the first defendant are the sons of Muthusamy Gounder. Even according to the plaint pleadings, the properties of Muthusamy Gounder were partitioned by metes and bounds orally between the plaintiff and the first defendant and they were enjoying independently.

10.2. Learned counsel for the appellant would contend that A Schedule properties were allotted to the plaintiff in pursuance of the oral partition and were enjoying the same and that the defendants are trying to encroach upon 'A' Schedule property necessitated the plaintiff to file a suit for declaration and injunction in respect of 'A' Schedule property.

10.3. Learned counsel for the respondents though admitted about the oral partition between the plaintiff and the first defendant in respect of the properties of late Muthusamy Gounder would contend that 'A' Schedule property was not allotted to the plaintiff in pursuance of the said oral partition.

10.4. The learned counsel for the respondents would further contend that the plaintiff is not in enjoyment of the 'A' Schedule property. Learned counsel for the respondents relied on the rough sketches and contended that the plaintiff and the defendants are in enjoyment of the respective portions in the ground reality as per the oral partition reflecting in the sketches and therefore, the plaintiff is not entitled for any relief as prayed for. The respective enjoyment in the ground reality as per the recital found in the sketches filed by the respondents/defendants was not disputed by the learned counsel for the appellant/plaintiff.

11. I take note of the rough sketches filed by the learned counsel for the respondents/defendants to deal with the facts on hand. The said rough sketches since admitted by the learned counsel for the appellant, the same shall form part of the record. The said Exhibit is numbered as Ex.C.1 to Ex.C.5.

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12. As per the plaint pleading, the plaintiff claims to be in possession of properties referred in red colour in Exhibit A1 to A5 respectively with regard to the land in Survey Nos.485, 486, 487, 431 and 489 respectively. At the time of argument, learned counsel for the appellant/plaintiff conceded that the plaintiff is not in possession of the land marked in red colour referred in Ex.A.1 to A5. As per the admitted document by the parties, as per Ex.C.1 to C.5, the plaintiff is in possession of the land marked in green colour in the said exhibits. Similarly, defendants are in possession and enjoyment of the land marked in yellow colour in the said exhibits. Admittedly, the suit is for declaration of title in respect of red portion of land in favour of the plaintiff as per Ex.A.1 to A.5. The plaintiff has also prayed for permanent injunction in respect of land marked in red colour in the said exhibits claiming to be in possession of the same.

13. It is proved that the plaintiff is not in possession of the land marked in red colour reffered in Ex.A.1 to Ex.A.5.

14. In the ground reality, the plaintiff and the defendants are in possession of lands marked in green colour and yellow colour respectively referred in Ex.C.1 to Ex.C.5. It is not the case of the appellant/plaintiff that in the ground reality after institution of the suit, the plaintiff was dispossessed of the land marked in red colour in ex.A.1 to Ex.A.5 by the defendants and that the plaintiff presently is in possession of the land marked in green colour referred in Ex.C.1 to Ex.C.5. The appellant now seeks relief in respect of the land marked in green colour referred in Ex.C.1 to Ex.C.5. The relief now asked for is contra to the pleadings in the plaint. Further, there is no petition filed seeking amendment of the prayer.

15. Whereas, the learned counsel for the respondents/defendants rightly pointed out that the plaintiff and the defendants are in enjoyment of the respective portions of the land allotted by oral partition entered into between them earlier to 1970. It is also admitted that the land under dispute was resurveyed in the name of the plaintiff and the defendants as per the enjoyment of land in the light of Ex.C.1 to Ex.C.5.

16. It is not the case of the plaintiff that the land was resurveyed in the name of the plaintiff and the defendants not in the light of Ex.C.1 to Ex.C.5.

17. The ground reality is that the plaintiff and the defendants are in enjoyment of the land respectively as per Ex.C.1 to Ex.C.5 for more than 35 years. Taking note of such fact, the revenue department has also resurveyed the land in the name of the plaintiff and the defendants.

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18. The only objection raised by the learned counsel for the appellant/plaintiff is that the land was re-surveyed without giving notice to the plaintiff. He also relied on the decision reported in the case of STATE OF MADRAS BY COLLECTOR, RAMNAD VS KASTHURI AMMAL AND OTHERS (1974 TNLJ 145) in support of his contention. Learned counsel for the respondents/defendants confronted the argument of the learned counsel for the plaintiff/appellant and submitted that the principle laid down in the said decision is not applicable to the facts on hand as the land was resurveyed in the name of the plaintiff and defendants according to the ground reality of enjoyment of their respective land.

19. Admittedly, the land under dispute was resurveyed in the name of the plaintiff and the defendants after due publication in the Gazette. The land was resurveyed in the name of the plaintiff and the defendants only on the basis of the enjoyment of the land by the plaintiff and the defendants on the date of resurvey. Further, the plaintiff has not placed any material to show that the plaintiff was in enjoyment of the land marked in red colour referable to Ex.A.1 to Ex.A.5 as per oral partition. There is absolutely no record to show that the plaintiff was ever in enjoyment of the land marked in red colour referred to in Ex.A.1 to Ex.A.5. In such view of the fact, since the land under dispute was resurveyed in the name of the plaintiff and the defendants on the basis of their respective possession and enjoyment, it is not open to the plaintiff to question the validity of re-survey of the land under dispute. Therefore, I am of the considered view that the said decision is not applicable to facts on hand.

20. The lower court dealt this point in that line and rightly rejected the contention of the plaintiff. I do not find any illegality or impropriety in the order of the lower court. The finding of the lower court is in order. Hence, this point is answered against the plaintiff.

21. Point No.2:- In view of the finding rendered in Point No.1, this point is answered in favour of the defendants.

22. Point No.3:- In view of the fact that the plaintiff is not in enjoyment of 'A' Schedule property as on date, he is not entitled for any injunction in respect of the same against the defendants. Hence, this point is answered against the plaintiff.

23. Point No.4:-In view of the finding rendered in Points 1 to 3, plaintiff is not entitled for partition of the suit property and hence this point is answered against the plaintiff.

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24. Point No.5:- In view of the finding rendered in Points 1 to 4, I am of the considered view that the findings of the lower court is in order and does not require any interference. Accordingly, the appeal fails and the same is dismissed. The parties have to bear their respective costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

nvsri

To

1. The Subordinate Court, Erode, Periyar District.

2. The Record Keeper,
VR Section,
High Court, Madras.

1 cc to Mr.M. Duraiswamy, Advocate, sr. 20008
1 cc to Mr.S.T.S. Murthi, Advoate, Sr. 20100

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